

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Amendment of Parts 1, 21, 73, 74 and 101 of the	)	WT Docket No. 03-66
Commission's Rules to Facilitate the Provision of	)	RM-10586
Fixed and Mobile Broadband Access, Educational	)	
and Other Advanced Services in the 2150-2162	)	
and 2500-2690 MHz Bands	)	
	)	
Part 1 of the Commission's Rules – Further	)	WT Docket No. 03-67
Competitive Bidding Procedures	)	
	)	
Amendment of Parts 21 and 74 to Enable	)	MM Docket No. 97-217
Multipoint Distribution Service and the	)	
Instructional Television Fixed Service	)	
to Engage in Fixed Two-Way Transmissions	)	
	)	
Amendment of Parts 21 and 74 of the	)	WT Docket No. 02-68
Commission's Rules with Regard to Licensing	)	RM-9178
in the Multipoint Distribution Service and in the	)	
Instructional Television Fixed Service for the	)	
Gulf of Mexico	)	
	)	
Promoting Efficient Use of Spectrum Through	)	WT Docket No. 00-230
Elimination of Barriers to the Development of	)	
Secondary Markets	)	
	)	
To: The Commission		

**PETITION FOR PARTIAL RECONSIDERATION OF  
THE BRS RURAL ADVOCACY GROUP**

Stephen E. Coran  
Rini Coran, PC  
1501 M Street, N.W., Suite 1150  
Washington, D.C. 20005  
(202) 463-4310

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Its Attorneys

## Summary

The BRS Rural Advocacy Group (the “Group”) commends the Commission for its efforts in promulgating far-reaching and much-needed changes to the rules governing the licensing, operation and flexible uses of Broadband Radio Service (“BRS”) and Educational Broadband Service (“EBS”) spectrum. In many respects – and particularly in urban markets – these dramatic changes will enable BRS and EBS licensees to introduce advanced wireless services to compete with other technologies.

In one significant respect, however, the Commission dealt a severe blow to those BRS/EBS operators that may want to maintain their existing multichannel video programming distribution (“MVPD”) services and “opt out” of a transition to the new band plan. Specifically, in lieu of the balanced, compromise terms presented by the industry Coalition that would allow a BRS or EBS licensee to *automatically* “opt out” if it provided service to at least five percent of the households within its geographic service area (“GSA”) or transmitted video programming on more than seven digital channels, the Commission instead decided to permit licensees and operators to “opt out” only upon waiver granted by the Commission.

The Group seeks reconsideration of this decision and, in addition, urges adoption of a new self-effectuating benchmark that will permit a licensee (or its affiliate) to “opt out” of a transition if:

- (a) the licensee’s GSA includes a “rural area,” defined as a county having a population density of 100 or fewer persons per square mile; *and*
- (b)(i) it provides MVPD and/or broadband service to more than 15 percent of the households within the portion of any “rural area” that is within the GSA; *or* (ii) it provides MVPD service to at least 500 customers.

The Commission’s stated rationale for adopting its waiver standard does not withstand scrutiny. First, the Group cannot understand how an inherently interpretive

waiver process is less complicated than a process that is self-effectuating and is based on specific and ascertainable factual data. Moreover, because both MVPDs and transition proponents will know before a transition is initiated whether a licensee can “opt out,” both will benefit from the certainty and lack of delay that pre-determined “opt-out” benchmarks will ensure.

Second, the Group disagrees with the Commission’s statement that a self-effectuating “opt out” system is unnecessary to protect MVPDs. With certainty in the “opt-out” process, MVPDs will be better able to design their systems for the future and be better able to raise investment necessary to expand service.

Third, the Commission overstates the presumed effect that MVPDs will have on the ability of nearby systems to transition to the new band plan. In many cases, the Group members operate far from population centers that would be more likely to benefit from low-power operations. There are also other techniques, such as interference consents and technical modifications, that could be employed instead of the more draconian result of a forced transition.

Fourth, the Commission does not explain how its transition plan accommodates incumbent MVPDs. The Group strongly believes that a self-effectuating “opt-out” process based on specific benchmarks provides a far greater level of security for their existing operations.

The Commission also should permit MVPDs to “opt out” of a transition if it (or its affiliate) provides MVPD and/or broadband service to more than 15 percent of the households within the portion of any “rural area” that is within its GSA or provides MVPD service to at least 500 customers. Adoption of this benchmark would allow MVPDs, including those providing analog service that have been unable to convert to digital

technology, to maintain their service offerings in sparsely-populated rural areas of the country where competitive choice is limited (in the case of high-end video services such as DBS) or non-existent (in the case of broadband, where no alternatives may exist). As with the proposals advanced by the Coalition, the data required to demonstrate eligibility for this “opt-out” benchmark would not be difficult to obtain or substantiate.

Regardless of whether it implements the self-effectuating “opt-out” criteria, the Commission should, as proposed by the Coalition, require transition proponents to cover the costs of any reasonable technical changes to the MVPD’s facilities that would reduce interference to transitioning systems. This mechanism incorporates methods other than a forced transition that neighboring systems can use to better manage interference if one transitions and the other does not, and will help ensure the cooperation of MVPDs that “opt out.”

The Commission also should make clear its implication that any licensee or operator that “opts out” will retain its license after the transition period and that its spectrum thus will not be deemed “un-transitioned” for purposes of auction or other disposition of the spectrum.

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**PETITION FOR PARTIAL RECONSIDERATION OF  
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The BRS Rural Advocacy Group (the "Group"), a coalition of Broadband Radio Service ("BRS") operators and licensees in rural markets,<sup>1</sup> by counsel, hereby submits this Petition for Partial Reconsideration of the transition "opt-out" rules and policies adopted in

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<sup>1</sup> A list of the Group members and the markets where they operate is attached hereto as Exhibit 1. In addition to filing this Petition, on October 27, 2004, the Group (consisting of most of the same members joining this Petition) filed an Opposition to a Petition for Reconsideration of Globalstar LLC seeking to reverse the Commission's decision authorizing sharing of the 2495-2500 MHz band between the Mobile Satellite Service and BRS. The Group supported proposals relocate Channel BRS-1 to 2496-2502 MHz only if it maintained primary status. See Review of the Spectrum Sharing Plan Among Non-Geostationary Satellite Orbit Mobile Satellite Service Systems in the 1.6/2.4 GHz Bands, *Report and Order, Fourth Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 13556 (2004) ("Order").

the above-captioned proceeding.<sup>2</sup> As demonstrated below, if the waiver procedures of the “opt-out” provisions are retained, the members of the Group could lose the legal right to continue providing multichannel video programming distribution (“MVPD”) services and rural Americans could be deprived of choice in video providers. Moreover, both transition proponents and MVPDs desiring to “opt out” would suffer from the uncertain outcome of a Commission waiver decision and the delay associated with Commission consideration of a waiver request.

A far better solution would be to adopt the balanced and self-effectuating proposal advanced by the industry Coalition to permit BRS and EBS licensees to “opt out” of a transition if they can meet either a channel capacity or penetration benchmark. In addition, to further accommodate the needs of rural MVPDs to continue providing important public service, the Group herein proposes that the Commission should also permit a BRS or EBS licensee (or its affiliate) to “opt out” of a transition if: (a) its geographic service area (“GSA”) covers a county defined by the Commission as a “rural area;” and (b)(i) it provides MVPD and/or broadband service to more than 15 percent of the households within the portion of any “rural area” that is within the GSA; or (ii) it is part of a system that provides MVPD service to at least 500 customers.<sup>3</sup> Adopting these three “automatic” “opt-out” benchmarks would promote certainty and lead to investment in rural America.

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<sup>2</sup> See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 04-135, 19 FCC Rcd 14165 (2004) (“BRS/EBS Order”). A summary of the BRS/EBS Order was published in the Federal Register on December 10, 2004. See 69 Fed.Reg. 72020 (2004). By Order, FCC 04-258, released October 29, 2004, the Commission modified the BRS/EBS Order to implement technical rules for pre-transition operations and to clarify certain non-technical rules.

<sup>3</sup> This would account for situations where, for instance, the licenses are held by one entity and the operations are conducted by a commonly-controlled entity.

### Statement of Interest

The members of the Group operate BRS/EBS systems serving numerous small and rural communities throughout rural America. They pioneered the delivery of multichannel video programming distribution (“MVPD”) services in rural America and, even as direct broadcast satellite (“DBS”) services have proliferated, continue to provide competitive choice in the MVPD marketplace. In many cases, the Group members provide MVPD services where there is no cable, and today provide the only alternative to the DBS services offered by EchoStar and DirecTV. Likewise, the broadband services they provide are available in many areas where DSL and cable modem services are not, and thus currently provide the only means for consumers to obtain broadband access.

The Commission acknowledged in the *BRS/EBS Order*, “there remains a continued need for high-power operations in the band” and “high-power systems allow use of spectrum in rural areas where low-power systems are not as effective.”<sup>4</sup> The Group’s operations illustrate these circumstances. For example, **Central Dakota TV, Inc.** has been providing video service on MDS channels in rural communities near Carrington and Jamestown, North Dakota since 1990, and also uses that spectrum to provide high-speed wireless broadband services to customers that have no other broadband option. **Evertex, Inc.** utilizes all of the capacity on its BRS licenses to provide MVPD and broadband services in the agriculturally-based communities of Everly, Palmer and Sioux City, Iowa. Evertex has provided video services for 16 years and broadband for the last five, and currently provides MVPD service to 1,500 customers and broadband services to more than 2,100 customers, the overwhelming majority of whom have no other choice in service. **Northern Wireless Communications, Inc.** began providing MVPD services on BRS frequencies in the

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<sup>4</sup> *BRS/EBS Order* at ¶46.



Aberdeen-Bath, South Dakota area in 1988, and now provides multichannel video services to 1,240 customers and wireless broadband services to 540 customers. **Northwest Communications Cooperative** has, since 1990, provided MVPD services in northwest North Dakota, and today serves approximately 700 subscribers. Using Channel BRS-1 for upstream, it also provides broadband service to approximately 300 subscribers. **Polar Communications** offers data services over BRS spectrum in Grand Forks, North Dakota and other communities in northeast North Dakota and northwest Minnesota. **Santel Communications Cooperative, Inc.** provides wireless broadband service to 425 customers from transmit sites near Mitchell and Mt. Vernon, South Dakota, with the number of customers increasing rapidly. **Starcom, Inc.**, which began operations in 1991, provides MVPD services to 800 subscribers and broadband services to 500 subscribers in small agricultural communities in southern Minnesota and northern Iowa from a transmit site at Fairmont, Minnesota. **United Telephone Mutual Aid Corporation** began its BRS video service in 1990, and now provides 18 channels of multichannel video service to approximately 1,000 subscribers in Milton and Egeland, North Dakota. In partnership with Polar Communications, United also provides data services using BRS-1 for upstream communications. **West River Cooperative Telephone Co. and G.W. Wireless Incorporated Partnership** recently purchased the Rapid City, South Dakota BTA and are developing a business plan to deploy service in rural communities in western South Dakota and Wyoming.

The Group commends the Commission for its careful consideration and adoption of rules designed to hasten the introduction of advanced wireless services. In large measure, the *BRS/EBS Order* embraces the compromises among operators, educators, licensees and equipment vendors that resulted in a balance among the disparate objectives of incumbent

MVPDs and prospective broadband providers, commercial interests and educational users, and TDD vendors and FDD vendors. The Group believes, however, that the Commission skewed this equilibrium – to the detriment of all stakeholders – in establishing a waiver process to consider whether to permit certain MVPDs to “opt out” of a transition to the de-interleaved band plan.

The Group thus urges the Commission to adopt the proposal made by the Coalition that would permit certain BRS and EBS licensees and operators to “opt out” of a transition to the new band plan without requiring waiver of Commission rules. The Group also believes that the Commission should establish a third category by which an MVPD licensee can “opt out” by recognizing that its provision of service to a significant number of subscribers in defined “rural areas” should continue. The Group also supports the Coalition’s proposal that would require transition proponents to cover the reasonable costs of minor technical modifications that MVPDs would incur to help facilitate transitions in nearby markets. Finally, the Commission should clarify that spectrum held by a BRS or EBS licensee that “opts out” will not be treated as “un-transitioned” spectrum with respect to any future disposition or auction.

### **Background**

In the proposal submitted to the Commission that led to adoption of the notice of proposed rulemaking in this proceeding,<sup>5</sup> the industry Coalition proposed a carefully-crafted, well-reasoned approach to transitioning the BRS and EBS spectrum to the de-interleaved band plan that the Commission essentially adopted. Reflecting the contributions of and compromise by the Coalition members, the Coalition Proposal acknowledged that:

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<sup>5</sup> See “A Proposal for Revising the MDS and ITFS Regulatory Regime,” filed October 7, 2002 by the Wireless Communications Association International, Inc., the National ITFS Association and the Catholic Television Network (“Coalition Proposal”).

The new bandplan eliminates for much of the 2.5 GHz band the standard 6 MHz channelization used for video and imposes technical requirements (particularly, signal strength limits) that some video systems may not be able to meet absent modification. Yet, because the practical effect of exempting a wireless cable system operator from complying with the proposed rules is to hamper, if not preclude, deployment of next generation systems in the same market and in neighboring markets, care must be taken to limit the protection only to those situations where the public interest would suffer substantial harm if required to transition to the new bandplan.<sup>6</sup>

To alleviate these concerns, the Coalition proposed that a BRS or EBS licensee could “opt out” of a transition if it or its affiliate is an MVPD (as defined in the Communications Act of 1934, as amended (“the Act”)) and it uses the 2.5 GHz band to provide service to at least five percent of the households within its GSA, to be certified to the Commission within 30 days following the effective date of the rules.<sup>7</sup> In a supplement to the Coalition Proposal filed as a result of concerns raised by rural wireless MVPDs,<sup>8</sup> the Coalition proposed that a licensee also could “opt out” of a transition if it was part of a system that deployed digital technology on more than seven channels as of October 7, 2002 (the date on which the Coalition Proposal was filed with the Commission).<sup>9</sup> Stations collocated with any licensee electing to “opt out” also could elect to not join the transition. Commenters generally supported the Coalition Proposal,<sup>10</sup> although some rural operators asserted that the “opt out” proposal did not go far enough in protecting the interests of rural MVPD systems.<sup>11</sup>

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<sup>6</sup> Coalition Proposal at Appendix B, p.17.

<sup>7</sup> *See id.*

<sup>8</sup> *See, e.g.*, Comments of the Alliance of Independent Wireless Cable Operators, RM-10586, filed November 14, 2002.

<sup>9</sup> *See* Supplement to Coalition Proposal filed November 14, 2002 at 4-5. This proposal was added to “alleviate . . . concerns” of MVPDs that had recently deployed digital technology and did not yet serve five percent of the households in the GSA, and thus would not be entitled to “opt out.” *Id.* at 4. The Coalition concluded that the inclusion of a second criterion would avoid the “unduly harsh” result of penalizing licensees that had recently installed more efficient digital technology in order to provide substantially more video programming channels to subscribers. *Id.*

<sup>10</sup> *See, e.g.*, Comments of W.A.T.C.H. TV Company filed September 8, 2002 at 4-6 (supporting Coalition’s “opt-out” proposal for video systems providing more than seven digital channels and potential reduction in programming channels if “opt-out” not adopted); Reply Comments of Digital TV One filed October 23, 2003 at 3 (stating that it was “critical” that new rules incorporate the “opt-out” proposal for BRS/EBS MVPDs); Written Ex Parte Presentation of Sioux Valley Wireless filed May 30, 2004 at 1-2 (noting “importance of

Notwithstanding the industry's widely-held view that rural video systems should be afforded the opportunity to maintain their operations under certain defined circumstances, the Commission determined that it would instead "consider waivers" of the transition rules in circumstances where the licensee or operator could meet the criteria described in the Coalition Proposal. The Commission stated that:

we believe that adopting the Coalition's proposal to allow MVPD licensees that meet the requirements detailed above to "opt-out" of the transition needlessly complicates the transition process and is unnecessary to protect MVPD licensees, especially those that are currently using the entire BRS/EBS spectrum. We are particularly concerned, moreover, that the adoption of a blanket "opt-out" for high-powered MVPD licensees may result in interference to licensees in neighboring population centers, which would prevent these neighboring locales from receiving wireless broadband services under the rules adopted today. Moreover, we believe that existing MVPD providers could be accommodated under the Transition Plan we have adopted today.<sup>12</sup>

As discussed below, the members of the Group believe it is unnecessary, burdensome and counterproductive for the Commission to require waivers in order for MVPDs to "opt out" of a transition. In essence, the Commission has taken a self-effectuating proposal that would reduce burdens on Commission staff and promotes certainty that will stimulate investment, and replaced it with the vagaries and discretion of a waiver process. In the best case, transition proponents and MVPDs will lose the certainty associated with an "opt out" decision that would rest with the affected MVPD, and will lose valuable time in reconfiguring the band while the Commission considers waiver requests. In the worst case, a waiver request could be denied and rural consumers could lose access to competitive MVPD services. Contrary to the Commission's view, the waiver process "needlessly

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preserving the relatively few successful video systems such as ours by providing an 'MVPD opt-out' that will allow us to continue to operate our current system for as long as local marketplace conditions dictate that it is the best use of our spectrum").

<sup>11</sup> See, e.g., Joint Comments of Adams Telcom, Inc., Central Texas Communications, Inc. and Leaco Rural Telephone Cooperative, Inc. filed September 8, 2002 at 3-4; Comments of Teton Wireless Television, Inc. filed September 8, 2002 at 8-9.

<sup>12</sup> BRS/EBS Order at ¶76.

complicates the transition process,” and the Coalition’s proposed “opt out” simplifies it to ensure that rural Americans retain access to MVPD services. Accordingly, the Commission should adopt the transition “opt out” provisions proposed by the Coalition.

The Group also urges the Commission to establish an additional self-effectuating “opt out” benchmark. As further described below, an MVPD (or its affiliate) should be entitled to “opt out” of a transition if: (a) its GSA covers any portion of a “rural area,” as defined in the Commission’s recent *Rural Order*,<sup>13</sup> and (b)(i) it provides MVPD and/or broadband service to more than 15 percent of the households within the portion of any “rural area” that is within the GSA; or (ii) it is part of a system<sup>14</sup> that provides MVPD service to at least 500 customers.

Also, as proposed by the Coalition, the Commission should adopt rules requiring transition proponents to cover the reasonable costs of minor technical modifications that MVPDs would incur to help facilitate transitions in nearby markets. The Commission also should clarify that any licensee or operator that “opts out” of a transition will not be deemed to hold “un-transitioned” spectrum that would be subject to the involuntary exchange of licensed spectrum for bidding offset credits, to the extent the Commission ultimately adopts such a plan, or other spectrum disposition.

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<sup>13</sup> See Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, *Report and Order and Further Notice of Proposed Rule Making*, 19 FCC Rcd 19078 (2004) (“*Rural Order*”), at ¶¶11-12.

<sup>14</sup> In this context, the system would include BRS and commercial EBS channels licensed to the MVPD and BRS and EBS channels leased to the MVPD.

## Discussion

### **I. THE COMMISSION SHOULD REVERSE ITS DECISION TO REQUIRE MVPDs TO SEEK WAIVER OF THE TRANSITION RULES AND INSTEAD ADOPT RULES PERMITTING CERTAIN MVPDs TO “OPT OUT” OF A TRANSITION WITHOUT HAVING TO SEEK A WAIVER.**

#### **A. The Commission Should Adopt the Self-Effectuating “Opt-Out” Benchmarks Proposed by the Coalition.**

Though it professes “sympath[y]” to rural MVPDs that would suffer from its decision, the Commission offers four reasons for adopting a waiver process in lieu of the Coalition’s self-effectuating “opt out” proposal.<sup>15</sup> First, the Commission claims that “the requirements detailed [in the Coalition Proposal] to ‘opt-out’ of the transition needlessly complicates the transition process.”<sup>16</sup> Second, the Commission asserts that pre-determined “opt-out” criteria “is unnecessary to protect MVPD licensees, especially those that are currently using the entire BRS/EBS spectrum.”<sup>17</sup> Third, the Commission presumes “that the adoption of a blanket “opt-out” for high-powered MVPD licensees may result in interference to licensees in neighboring population centers, which would prevent these neighboring locales from receiving wireless broadband services under the rules adopted today.”<sup>18</sup> Fourth, the Commission “believe[s] that existing MVPD providers could be accommodated under the Transition Plan we have adopted today.”<sup>19</sup> As discussed below, these unsupported conclusions ring hollow.

#### **1. The Coalition “Opt-Out” Plan Would Simplify, Not Complicate, the Transition Process.**

The Commission offers no explanation as to how the consensus “opt-out” proposal would “needlessly complicate the transition process.” To the contrary, it would create

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<sup>15</sup> BRS/EBS Order at ¶¶76-77.

<sup>16</sup> *Id.* at ¶76.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

narrow, simple and readily-ascertainable exceptions to the transition rules. In order to demonstrate that it serves five percent of the households with video programming, the MVPD must rely on existing Commission definitions<sup>20</sup> and must make its showing within 30 days of the effective date of the rules. This benchmark prevents inclusion of subscribers added after the date-certain deadline. MVPDs have one opportunity to comply. Similarly, in order to demonstrate that it provides more than seven channels of digital video programming, MVPDs must so certify as of October 7, 2002 – any channels added after that date would not be taken into account. In short, under the Coalition Proposal, it is possible to know *today* which MVPDs could “opt out” of a transition. This is a significant benefit because it identifies for all other operators, including transition proponents, those MVPDs that may – or may not – elect to participate in a regional transition. And this information would become public knowledge before a transition is initiated. With this information, a transition proponent could immediately begin the process of designing its re-banded system.

The Commission states that, in reviewing waiver requests, it “will consider the actions taken by MVPD or BRS licensees to minimize the affect of interference on neighboring markets, as well as the licensee’s explanation as to why it cannot work within the transition rules.”<sup>21</sup> To be sure, this process would unnecessarily raise a number of questions. What efforts will a waiver applicant need to undertake to show how it tried to minimize interference? What will qualify as a sufficient explanation of why the transition rules should not apply? What will the Commission consider to be a “reasonable alternative” under Section 1.925(b)(3) of the Commission’s rules? What level of interference mitigation will the Commission deem acceptable? Will a waiver applicant be required to alter its system

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<sup>20</sup> “Multichannel Video Programming Distributor” is defined in Section 522 of the Act. “Household” is defined in Section 76.905(c) of the Commission’s Rules.

<sup>21</sup> BRS/EBS Order at ¶77.

and lose customers in order for the waiver to be justified? How long will the Commission take to issue a decision? Can the Commission ensure consistency in the application of its waiver standards? If a waiver request is dismissed or denied, how long will the MVPD have to comply with that decision? If the waiver applicant seeks reconsideration or review, will the transition proponent be required to proceed with the transition?

The Commission makes no attempt to address these issues. Under the Coalition Proposal, it would not even have to dedicate time and resources to consider these questions – the “opt-out” would be self-effectuating. The waiver process adopted by the Commission is not simpler than the Coalition’s “opt-out” plan and would unduly complicate and delay the transition process.

## **2. Self-Effectuating “Opt-Out” Criteria is Necessary to Protect MVPDs.**

The Commission fails to explain why self-effectuating “opt-out” standards would be “unnecessary” to protect MVPDs. The ability of MVPDs to rely on specific “opt-out” criteria establishes certainty in the process. Without such certainty, MVPDs may not be required to modify, curtail or discontinue operations, but they would feel much more secure with a safety net to help guard their investment.

The ability to “opt-out” without exposure to an interpretive waiver process has another advantage – MVPDs will better be able to design their systems now. Simply by counting channels or subscribers, an MVPD licensee can determine whether it could “opt out,” and make business plans and allocate resources accordingly. An MVPD that cannot predict if its waiver request would be granted or how long it may take for a decision to be issued may decide to not invest in system expansion. An MVPD also may have difficulty obtaining financing if its investors cannot rely on a process that is inherently subject to the



Commission's discretion –it can take little comfort in the language in the *BRS/EBS Order* stating that the Commission will “consider” requests for waiver of the transition rules.

**3. The Commission Overstates the Presumed Effect of MVPD Systems on the Ability of Nearby Systems to Transition.**

The Commission summarily concludes that adopting a self-effectuating “opt-out” for MVPD licensees may result in interference to licensees in nearby population centers, thereby preventing wireless broadband service. While perhaps attractive from a theoretical standpoint, this statement does not withstand scrutiny in the practical context of a transition.

First, many rural systems are not near large cities where the demand for wireless broadband services would perhaps be greatest, but instead are adjacent to each other. For example, the GSAs of the two Northwest Communications Cooperative systems overlap, and the two Northern Wireless Communications' systems are alongside each other. These markets are far from any large population center.<sup>22</sup> In other cases, the large population centers and rural communities are served by the same entity. Polar Communications, which holds the Grand Forks BTA and serves the Grand Forks, North Dakota market, also has established sites in Lakota, North Dakota and Thief River Falls and Robbin, Minnesota, and retains the right to establish additional sites in the BTA. Similarly, Evertek serves the Sioux City, Iowa market as well as the rural communities of Ft. Dodge, Mason City, Palmer and Spencer, Iowa. While these examples are not exhaustive, they provide factual evidence that interference will not necessarily preclude new wireless broadband services if existing wireless MVPD services are protected.

Second, in cases where the systems are located far from the proponent's system, but within the same transition area, a rural MVPD may not be required to reband. For instance,

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<sup>22</sup> In fact, these communities lie within the Minneapolis Major Economic Area (“MEA”), but are hundreds of miles from the city of Minneapolis.

if the Minneapolis operator initiated a transition, the system in Bowbells, North Dakota likely would not need to alter its technical parameters. While this is certainly the case if the Commission continues to define the MEA as the transition area, it also would be true if the rules were amended to define a smaller geographic area as the transition area. These further examples help place in context the effect that rural MVPDs could have on the transition in larger population centers.

Third, the practical effect of the circumstances in which an MVPD could qualify for an “opt-out” are very narrow – they are not designed to afford every rural MVPD the opportunity to “opt out.”

Finally, even where an MVPD elects to “opt out,” a transition proponent could still negotiate a private agreement in order to coordinate and manage interference. These agreements could involve any number of alternatives, including interference consents, financial assistance, technical modifications and upgrades, etc.<sup>23</sup> The MVPD may even agree to transition to the new band plan. Whatever the case, the terms would be negotiated by the parties, and would reflect their specific circumstances.

The Group believes that the Commission overstates the potential impact MVPDs that “opt out” would have on larger markets. When the practicalities of the transition process are put to the test, it is apparent that the Coalition Proposal appropriately respects the interests of a small number of BRS/EBS spectrum-rights holders without impinging on the ability of proponents to transition nearby markets.

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<sup>23</sup> See Coalition Reply Comments at 46-47. See also Part II, *infra*.

**4. The Commission Fails to Explain How its Transition Plan Accommodates Incumbent MVPD Providers.**

As its final basis for adopting a waiver process, the Commission states that its transition plan “can accommodate existing MVPD providers.”<sup>24</sup> While this may prove to be true in the future, the Group believes that the discretion afforded the Commission through a waiver process provides less certainty – for both the MVPD provider as well as the transition proponent – than the self-effectuating “opt-out” proposal forged through industry consensus. Stated another way, maybe the Commission’s plan “*can*” accommodate incumbents, but the Coalition Proposal *will*.

**B. The Commission Should Permit a Licensee or Operator to “Opt Out” if its GSA Includes a “Rural Area” and it is Part of a System that Provides Competitive MVPD Service or MVPD Service to at Least 500 Customers.**

In addition to the two benchmarks proposed by the Coalition, the Group believes that a licensee should be able to “opt out” of a transition if it can meet a third, independent criterion that includes MVPDs serving a critical mass of customers in “rural areas.” Specifically, the Group urges the Commission to adopt a rule that would entitle a licensee to “opt out” of a transition if: (a) its GSA covers any portion of a “rural area,” as defined in the *Rural Order*; and (b) (i) it provides MVPD and/or broadband service to more than 15 percent of the households within the portion of any “rural area” that is within the GSA; *or* (ii) it is part of a system that provides MVPD service to at least 500 customers. Adopting this rule would permit truly rural MVPDs that provide competitive services or serve a large number of subscribers to maintain their video operations without undergoing a forced transition, and would ensure that rural American retain a choice in MVPD services or retain access to their broadband services.

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<sup>24</sup> BRS/EBS Order at ¶77.

In certain cases, even the benchmarks proposed by the Coalition would exclude MVPDs providing service to a significant number of rural Americans. Certain members of the Group provide 15-30 channels of analog MVPD service. In order to compete with DBS and, to a lesser extent, digital cable systems, these MVPDs would need additional spectrum and substantial investment to increase the number of programming streams. Although most have obtained site-specific licenses for BRS channels, for several years they have had no opportunity to acquire EBS spectrum necessary to dramatically increase capacity and compete. Without additional spectrum, rural MVPDs have been unable to secure the investment necessary to convert their systems to digital technology. As a consequence, these rural MVPDs have adopted a “best of cable” business plan in which customers are offered fewer programming streams at lower cost with local customer service, rather than a 500-channel digital system at higher cost from a national provider. By providing these services, and initiating broadband services in rural America, the Group members have demonstrated compliance with the Commission’s rules and policies.

Because the rural MVPDs serve sparsely-populated areas and attract customers interested in viewing a smaller number of programming streams, many may not have achieved the five percent household penetration benchmark contained in the Coalition Proposal throughout their GSAs. In some cases, the combined number of digital cable and DBS subscribers may be so great that fewer than five percent of the households in the GSA are available to be served by the BRS/EBS operator. These remaining households may not desire digital services or may be unable to afford the relatively high cost of DBS or digital cable. In some areas, unlike urban markets, digital cable services may not be available, leaving rural customers with the choice of either DirecTV or EchoStar, which offer hundreds of channels. This is really no choice at all.

What remains is a critical mass of loyal customers who do not want to abandon their analog BRS/EBS MVPD service and face the lack of choice inherent in picking between two national, high-cost DBS providers. For these systems and areas, a third alternative for “opt-out” eligibility is necessary. The proposal advanced by the Group would be limited to licensees who’s GSAs include “rural areas,” counties that have a population density of 100 persons or fewer per square mile. As the Commission has observed, “definitions based on county boundaries are easy to administer and understand, population data based on county boundaries are widely available to the public, and county boundaries rarely change.”<sup>25</sup>

In addition to this requirement, the Group proposes that only those licensees that provide “effective competition” in a “rural area” or serve a minimum of 500 customers be eligible to “opt out” under this criterion. A licensee desiring to “opt out” under this benchmark would file a certification with the Commission demonstrating that, as of the effective date of the adoption of rules implementing the self-effectuating “opt-out” provisions, its GSA covers a “rural area” and it either exceeds the 15 percent threshold in that a “rural area” or serves at least 500 customers.

This proposal is drawn narrowly so that it includes only those MVPDs that not only serve defined “rural areas,” but those services are either competitive or are received by a significant number of subscribers. In assessing MVPD competition, the Commission has long relied on the standard set forth in 623(l)(1)(B) of the Act, which finds that “effective competition” exists where a cable franchise area is:

- (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (ii) the number of households subscribing to programming services offered by the multichannel video programming distributors other than the largest multichannel video

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<sup>25</sup> *Rural Order* at ¶11 (footnotes omitted).

programming distributor exceeds 15 percent of the households in the franchise area.

This same concept is embodied in the Group's proposal, which is based on GSAs rather than cable franchise areas. With respect to the first element, in several reported cases, the Commission has acknowledged that "DBS service is presumed to be technically available due to its nationwide satellite footprint, and is presumed to be actually available if households in the franchise area are made reasonably aware that the service is available."<sup>26</sup> This presumption would be equally applicable to GSAs. With respect to the second element, Congress has established a 15 percent penetration threshold for the MVPD that is not the largest. Under this rationale, any cable operator providing service to more than 15 percent of the households is providing "effective competition" and is afforded relief from rate regulation<sup>27</sup> and BRS cross-ownership restrictions.<sup>28</sup> The same must be true of BRS and EBS licensees, which also provide service to exclusive, geographically-defined areas.

Thus, under this part of the Group's proposal, an MVPD could "opt out" of a transition only if it were providing the equivalent of "effective competition" in a "rural area" of its GSA. Excluded from this proposed benchmark are MVPDs that serve urban and heavily-populated markets and MVPDs that do not provide "effective competition."<sup>29</sup>

The Group also believes that those MVPDs that serve at least 500 customers with MVPD services have established a significant foothold in the market. In many cases, their

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<sup>26</sup> *MCC Iowa LCC*, DA 03-1193, released April 23, 2003, at ¶4. See also, e.g., *Coxcom, Inc.*, DA 02-2982, released November 4, 2002.

<sup>27</sup> See Section 76.911(a)(1) of the Commission's Rules.

<sup>28</sup> See Section 27.1202(e)(3) of the Commission's Rules.

<sup>29</sup> For purposes of this proposed "opt-out" benchmark, it is necessary to include those that subscribe to broadband services. In many rural systems, the MVPD and broadband services are operated from the same transmit site, with certain channels set aside for "upstream" broadband communications. As discussed above, these broadband services may be the only way that rural Americans can obtain broadband services. Thus, the inclusion of broadband households in the 15 percent calculation represents the significant number of rural Americans that receive BRS/EBS broadband services. In addition, as is the case with MVPD services, the cost to convert the system may be prohibitive for many rural operators.

customers are long-time, loyal subscribers that are attracted to the “best of cable” programming at affordable costs. Here again, this benchmark excludes MVPDs operating in urban areas and MVPDs that have not achieved a significant number of customers.

More importantly, this proposed benchmark would ensure that customers of rural MVPD systems – which could not acquire additional spectrum and could not obtain investment to convert to digital technology – will retain a clear choice in the type of MVPD services they can receive. If rural MVPD systems are forced to transition, they will be unable to maintain the same number of channels in the MBS, which would limit them to seven channels. Moreover, as the Commission appreciates, they may not be able to afford the costs to convert to digital technology, which would involve installation of new transmission equipment and change-out of customer premises equipment – expenses that may not be recoverable in order to ensure return on investment. As the Commission observed, “the expenses involved in deploying multiple cell sites to serve sparse populations may make it impractical to continue most services offered over high-power systems.”<sup>30</sup> Practically speaking, a forced transition could spell the end of low-cost, local MVPD service for thousands of rural Americans. The Group also believes that this proposal would not adversely affect the ability of licensees and operators in other markets to transition because, as discussed above, in many cases rural systems are located far from population centers.

## **II. TRANSITION PROPONENTS SHOULD BE REQUIRED TO PAY THE COSTS TO MODIFY FACILITIES OF MVPD PROVIDERS THAT “OPT OUT” OF THE TRANSITION.**

The Commission rejected a Coalition proposal<sup>31</sup> that would require transition proponents to cover the costs of any reasonable technical changes to the MVPD’s facilities

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<sup>30</sup> *BRS/EBS Order* at ¶46.

<sup>31</sup> *See* Coalition Proposal at Appendix B, p.18.

that would reduce interference to the transitioning systems.<sup>32</sup> To quote the Coalition, “[l]icensees should be required to reduce EIRP, reduce transmission antenna height, or add beam tilt where doing so can be accomplished without more than a *de minimus* reduction in the MVPD’s ability to serve its then-existing subscribers.”<sup>33</sup>

Regardless of whether the Commission reverses its decision and permits self-effectuating transition “opt-outs” for qualified MVPDs, it should adopt this proposal. This mechanism recognizes that there are means other than a forced transition or Commission waiver on which transition proponents could rely to transition their systems and on which MVPDs could rely to obtain compensation for making minor technical changes. It further ensures that MVPDs will be cooperative participants in the transition process.

### **III. THE COMMISSION SHOULD CLARIFY THAT LICENSEES AND OPERATORS THAT “OPT OUT” OF A TRANSITION WILL NOT BE SUBJECT TO ANY SPECTRUM DISPOSITION THE COMMISSION MIGHT REQUIRE FOR “UN-TRANSITIONED” SPECTRUM.**

In its discussion of the transition “opt out,” the Commission stops short of stating that any licensee or operator that legally “opts out” will be exempt from any future disposition of the spectrum in the event the spectrum is “un-transitioned” by the deadline to initiate transitions. Irrespective of whether it adopts self-effectuating transition “opt-out” procedures or retains its waiver procedures, the Commission thus should make clear that any licensee or operator that qualifies for an “opt-out” will retain its license and that the spectrum will not be treated as “un-transitioned” spectrum for future auction purposes.

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<sup>32</sup> BRS/EBS Order at ¶¶76-77, 93.

<sup>33</sup> The Coalition Proposal defined “*de minimus*” as a reduction of 5% or less in the number of actual subscribers,” and would require compensation to the MVPD for the loss of any subscriber in excess of 2.5% of the total subscriber base. *Id.* at n.48.



### Conclusion

For the reasons stated above, the BRS Rural Advocacy Group respectfully urges the Commission to:

- Adopt self-effectuating transition “opt out” benchmarks that permit a BRS or EBS licensee (or its affiliate) to “opt out” of a transition if:
  - it is an MVPD and it uses the 2.5 GHz band to provide service to at least five percent of the households within its GSA; *or*
  - it deployed digital technology on more than seven channels as of October 7, 2002; *or*
  - (a) its GSA covers any portion of a “rural area,” as defined in the *Rural Order*; and (b) (i) it provides MVPD and/or broadband service to at least 15 percent of the households within the portion of any “rural area” that is within the GSA; *or* (ii) it is part of a system that provides MVPD service to at least 500 customers; *or*
  - it is a licensee of a station collocated with any licensee electing to “opt out.”
- Adopt rules requiring transition proponents to cover the reasonable costs of minor technical modifications that MVPDs would incur to help facilitate transitions in nearby markets.
- Clarify that the spectrum held by a BRS or EBS licensee or operator that “opts out” will not be treated as “un-transitioned” spectrum with respect to any future disposition or auction.

Respectfully submitted,

**THE BRS RURAL ADVOCACY GROUP**

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By: /s/ Stephen E. Coran

Stephen E. Coran  
Rini Coran, PC  
1501 M Street, N.W., Suite 1150  
Washington, D.C. 20005  
(202) 463-4310

Its Attorneys

**Exhibit 1**

**The BRS Rural Advocacy Group**

**Central Dakota TV, Inc.**

Carrington-Jamestown, ND

**Evertex, Inc.**

Ft. Dodge, IA

Palmer, IA

Sioux City, IA

Spencer, IA

**Northern Wireless Communications, Inc.**

**(formerly Northern Rural Cable TV Cooperative, Inc.)**

Aberdeen-Bath, SD

Pierre, SD

**Northwest Communications Cooperative**

Bowbells, ND

Epping, ND

**Polar Communications**

Grand Forks, ND

Lakota, ND

Robbin, MN

Thief River Falls, MN

**Santel Communications Cooperative, Inc.**

Mitchell, SD

Mt. Vernon, SD

**Starcom, Inc.**

Fairmont, MN

**United Telephone Mutual Aid Corporation**

Egeland, ND

Milton, ND

**West River Cooperative Telephone Co. and G.W. Wireless Incorporated Partnership**

Rapid City, SD